ONLINE INTERNATIONAL ARBITRATION IN THE POST-COVID SCENARIO OF INDIA

SHORT SYNOPSIS

Submitted in partial fulfilment of the requirement of the degree of

DOCTOR OF PHILOSOPHY

to

Manav Rachna University

by

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2K21-PFL-005

Under the supervision of

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DECLARATION BY THE SCHOLAR

I hereby declare that the short synopsis "Online International Arbitration in the Post Covid Scenario of India" being submitted in partial fulfilment of the requirement for the degree of Doctor of Philosophy in Department of Law under Faculty of Law-Ph.D. Program of Manav Rachna University, Faridabad during the academic year 2021. It is a bona-fide record of original work carried out under the supervision of Dr. Som Dutt and has not been submitted in full or part to any other university or institute for degree or diploma. Further, it is certified that short synopsis is within the plagiarism limit and copy of the same is attached as per university norms.

(Jasmin Kurian)

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Abstract:

Arbitration has become prominent due to the emergence of globalization and commercialization and has made much changes at the international as well as national stages. Alternative Dispute Resolution has various techniques to solve the disputes other than the traditional court methods and Arbitration is one of such technique. The specialty of this method is that this method offers much freedom to the parties in dispute. The pandemic due to Covid 19 and its impacts made the people worldwide to think differently and to apply the technology to overcome the hurdles. The conventional educational methods and the working culture gave way to virtual schooling as well as work from home methods. Similarly, the conventional dispute resolution gave way to virtual courts. The lock-downs and the travel restrictions introduced by various States and countries, constrained to follow Online methods and virtual hearings, instead of the conventional Arbitration and alternative dispute resolution methods to settle the disputes. A mixture of technological features with conventional arbitration is the online arbitration. It is a combined application of two Acts, namely, "Arbitration and Conciliation Act 1996" with "Information Technology Act 2000". My research aims looking at the online arbitration and its dimensions and difficulties in the Indian scenario, and also examines the legal complexities arise in the use of this mixture of technology as well as conventional technique, and its advantages and disadvantages. It also looks forward to a set of rules and laws that is in conformity with UNCITRAL rules. The future of dispute resolution and the conventional method that state owned courts resolving the disputes in India, will gave way to online arbitration. This new form of arbitration would result in the decrease of the ever-increasing pendency of cases. This will also result the quick settlement of disputes, both in the international level as well as in the domestic level and will boost the business and trade worldwide. This research also aims to propose a draft model of rules for the Online International Arbitration and thereby to make India as a hub of International Commercial Arbitration.

Keywords: Online International Arbitration, ODR, Party autonomy, arbitrability, ADR, International Commercial Arbitration.

1) Background and Introduction to the study:

This proposed research is in fulfilment of Ph.D. (Law) Degree of the Manav Rachna University, Faridabad.

Alternative Dispute Resolution (ADR) is a way to resolve disputes outside the courts. In recent years ADR has become a trend which had replaced the traditional role and perception of State-owned judicial systems. Arbitration is a form of ADR. It can be well said that:

> "Arbitrability is recognized as a specific tool with which arbitration is equipped with in searching the balance between meeting expectations of clients, and also at the same time preserving the interest of State".

Basic object of the arbitration law is for a speedy and inexpensive dispute resolution. The signatories to an agreement undertake and agree to settle all possible differences regarding the agreement, which may arise in future, during the proceedings, instead litigation. Judicial intervention, therefore, should be in support of arbitration.

a. Effective alternative
b. Legitimacy
c. Interaction with judicial system/ court system (Section 5 provides the Framework)
d. Procedure – established by law
e. Final outcomes to be recognized and respected by law
f. Enforcement enabled by law

The parties manifest a clear intention to exclude adversarial Courts, by choosing arbitration. Arbitration proceedings can be commenced and concluded without any judicial involvement.

> "It is an implied term of an agreement to submit to arbitration, disputes arising under a contract that any award made on a submission will be honored,"

is an explicit recognition of award by the Common Law of England. However, in practical terms the possibility of intervention by the Courts cannot be ruled out. "United Nations Commission on Trade and Development (UNCTAD)" takes a critical note of judicial intervention.

"An arbitration proceeding can be blocked altogether by a Court just by restraining a party from participating in the proceedings"[1]. An arbitration proceeding can be interfered by "the composition of the tribunal, by adjudicating challenges on procedural orders of the tribunal, or by restraining the attorneys of foreign national to represent 'in the arbitration proceedings or any other control on the proceedings of the tribunal'. Moreover, the final award of the tribunal can be reversed on appeal or setting it aside. Excessive Court intervention suffocates the arbitration proceedings".

The Apex Court rightly pointed out in *Mc Dermott*[2], that:

> "the 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only like in case of fraud or bias by the arbitrators, violation of natural justice etc. The Court cannot correct errors of arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So the scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it"[3].

The importance of International Commercial arbitration has grown with the increased globalisation of world economies. The number of cases submitted to International commercial arbitration has continued to rise since 1980. International commercial arbitration permits parties to fashion dispute resolution proceedings as they see fit.

> "Arbitration is one of the modern techniques of alternative dispute resolution (ADR) that has gained a lot of prominence due to the freedom it offers to the disputants. Arbitration is the procedure by which disputant parties agree to submit their disputes to an independent neutral third party, known as arbitrator, who listens to the arguments and considers the evidence submitted before declaring a final award which is binding upon the disputant parties".

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[1] Available at, http://www.unctad.org, (last visited on August 06, 2021).

[2] *Mc Dermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181.

[3] *Ibid,* para 52.

If we take a glimpse of the evolution of arbitration, we can find that institutional reform was made in the history in its turning points for the advancement effective management of the systems and similarly in the case of arbitration. This adaptive nature and nature of adjusting to the situation helped the arbitration method of ADR to quickly adapting to the present crisis arose due to the pandemic.

Following the lockdown, our judiciary adapted the assistance of technology to provide justice to litigants by providing video conferencing facilities across the countries. This is with a need to prioritise urgent matters that has to be disposed off in the coming days. The Indian judiciary is marching forward to cop up with this emerging situation. But there are a lot of obstacles and interruptions that the judiciary has to overcome due to the lack of proper coordination and poor technical updates at times. Indian judiciary is designed by the Constitution of India in such a fashion that it is rigid and less flexible. So that it cannot be watered down to meet each and every situation.

When compared to this challenge, arbitration which is an alternate dispute resolution mechanism is more flexible being a private tribunal. It can of course be more flexible than the ordinary court system with its speciality of party autonomy. We have to be innovative to cop up the prevailing global pandemic. If the situation continues, we will end up with parties, counsels and tribunals sitting at different locations.

In the above scenario, the tribunal should be able to coordinate arbitration in an efficient manner. In this view, the role that can be well played by institutions comes to light. Due to the better infrastructure facilities and innovative ideas, the arbitrations can be efficiently tailored by the institutions according to the needs of the parties.

> "The traditional Arbitration system uses the Arbitration and Conciliation Act, 1996, as its main tool, while the Online Arbitration, as the name suggests, besides the applicability of Arbitration and Conciliation Act, 1996 also makes use of technologically related laws, particularly the Information Technology Act, 2000. In other words, it can be said that Online Arbitration is a blend of conventional Arbitration with the taste of technology in it"[4].

[4] http://www.lexology.com/library/detail.aspx?g=e09b721e-807b-4c8b-8451-da416874f39f : (last visited:12/08/2021)

2) Literature Review:

For the purpose of the proposed research, the researcher made a preliminary study and referred the following books, bare acts and study materials as a foundation work.

1. Nathan D. O' Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, New York: Informa Law, Routledge Taylor and Francis Group, 711, Third Avenue, New York, 100017, NY, USA; 2013, pp. 381.

How evidence will be introduced, obtained, perceived, and weighed are matters of concern for all lawyers who practice in the field of dispute resolution. For practitioners of international arbitration, it is no different. Nevertheless, while advocates appearing before domestic courts may attain guidance on these questions from their domestic rules on evidence, one may query as to what code those who ply their skills in international arbitration may appeal for answers?

2. W. Craig, W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, Oceana Publication; 2000.

This is a ready reference book and can be used as a guide in the matters of ICC arbitration. This book clearly analyzes by step by step, the procedures of ICC arbitrations. This is a very useful book to understand the working of International Arbitrations. It is a critical evaluation of what shall be done and what shall not be done and disadvantages & advantages of arbitral process. This book is in one single volume. It covers: What is the structure of ICC; How does the ICC works; The element of arbitration and arbitration agreement; practice of ICC Arbitration from notice to award, including the hearing, production of evidence, impact of municipal law on arbitration & the information generally.

3. Markanda,P.C., *Law Relating To Arbitration And Conciliation*, New Delhi: Lexis Nexis, 2018.

This book is a Section-wise commentary on Arbitration and Conciliation Act, 1996 is commented in this book by section-wise and commentary is given on law of Arbitration.

The Arbitration and Conciliation (Amendment) Act, 2015 is examined and detail commentary is given in this book. Several developments came in this subject in the

legislative as well as judicial interpretations, after the last edition of this book. The Madras High Court cited this book in various judgments including the cases of :

> "*NEPC India Ltd., formerly NEPC Micon Ltd.* v. *Sundaram Finance Ltd.*, 1998 IIIMLJ 116 and *Mankanner Jain School Welfare Society* v. *Anilkumar J. Doshi*, (2007) 1 MLJ 769".

This book elaborately discussed the evolution of Arbitration in India, especially how it developed during the pre- British era.

4. Dharmendra Rautray, *Principles of Law of Arbitration in India*, Mohali: Wolters Kluwer India (Pvt.) Ltd.; 2018.

Indian Arbitration law is dealt with principle-wise in this book. This is not a commentary of the Act by section-wise. Moreover the book deals with the principles of law based on the stages of the arbitration proceeding as a lawyer would experience whilst conducting an arbitration proceeding. Hence, the book is a practical guide to the conduct of arbitration proceedings which no other book currently in the market deals with. The chapters lead a reader through a step by step stage of the proceedings of arbitration. In addition to the aforesaid, this book brings out the principles couple with case laws supporting to it. Importantly, since the book deals with principles of law in arbitration it is more useful than section wise commentary as users need not read the whole case law to cull out the principles to put to practical use unlike a section wise commentary approach.

5. Justice S.B.Malik, *Commentary on the Arbitration and Conciliation Act, 1996*, 8th Edn., New Delhi: Universal Law Publishing Company; 2017.

This book is the updated commentary of the Arbitration and Conciliation Act, 1996. Various updates have been added due to amendments of the Act. Case laws added upto 2017. The old law, i.e., Arbitration and Conciliation Act, 1940 is included in the book for reference. The book is a result of in-depth research and is informative. This book is commentary of the Act in section-wise. The book is an authority on the subject of Arbitration with up-to-date case laws.

This book is helpful for the professionals as well as academicians on arbitration and conciliation law. The introduction of this book is written by Fali S. Nariman, Senior Advocate.

6. David St. John Sutton, *Russel on Arbitration*, 24th edn., London: Sweet and

Maxwell, 2018.

This book a guiding book for the Arbitration law practitioners in England and Wales. Every stage of arbitration is given in this book and thus it is a real guide for the practitioners. It also provide case law developments, alerting the practitioners to potential traps.

7. Bachawat R.S, *Law of Arbitration and Conciliation*, (Lexis Nexis, New Delhi, 6th edn., Vol. I, 2017).

This book is an exhaustive commentary on the Arbitration Act in India. About the international commercial arbitrations and enforcement of foreign awards is elaborately discussed in this book with a lot of international case reports.

This book is updated with commentaries by including the Arbitration and Conciliation (Amendment) Act, 2015. Topics included such as arbitration vis-à-vis cause of action, principles of Public interest litigation, injunction against conducting arbitration, public policy theory and scope, exclusive jurisdiction under s.42, s.11 position in India, explained in detail apart from the detailed commentaries and detailed case laws.

8. Gary B. Born, *International Commercial Arbitration: Cases and Materials*, (2011).

This book covers an exhaustive commentary of the legal doctrines and principles of arbitration. The basics of arbitration, its proceeding and procedure, domestic arbitration and international arbitration, and the difference between the procedures and the scope of court interference in arbitral proceedings are discussed and analyzed here.

9. The Arbitration and Conciliation Act, 1996 (as amended in 2019)- Bare Act.

In the light of these concerns, I found the study relevant to enquire that online arbitration can make substantive change in dispute resolution in India, especially in the post Covid scenario.

3) Research purpose & Objectives of the study:

The aim of this study is to analyse how arbitration proceedings can be conducted online. The central focus of the study is to examine the procedure of the challenge, consequences, and the rules that are needed to be followed for arbitration while virtual conducting of arbitration is carried out. Moreover, the other aims of this study are:

The research will be helpful to find out whether there is any existing rule to be followed by a while conducting online arbitration proceedings.

The research aims to analyse and find out how an award can be passed in an online arbitration proceeding.

This research also looks at the dimensions of online arbitration in India along with the difficulties.

This study will help to analyze the possible jurisdictional issues which may arise during an online arbitration. For more focus and clarity in the study area of research, the impact of existing arbitral laws and the interpretations of their court hearings will be focused. The other objectives of this study are:

i) To study the termination proceedings in an online arbitration.

ii) To examine the characteristics of online arbitration by exploiting the development of Information and communication technology.

iii) The innovative method of Online arbitration is very effective and suitable to the existing legal regime and people are accepting it due to its quick and effective remedy providing nature and as much relevance for this study.

4) Research Methodology: - This research is an Analytical research. The study is based on statutes, treaties, regulations and case laws and the published text books and journals. The methodology proposed to adopt for this study is exclusively doctrinal research.

(i.) Sources of data collection: The main sources of data collection are from published materials such as books, journals, law commission reports, case laws, internet and library research.

(ii.) Collection techniques: This is doctrinal research and therefore the material is to be collected by reading published materials and reading the reported cases on the subject.

(iii.) Data analysis techniques: By doctrinal method only.

There are two main methods in Legal Research, doctrinal and non-doctrinal. My research is purely based on doctrinal method wherein the subject matter of research is found in existing materials such as books, articles, statutes, judgements, etc.

Doctrinal method of research was the traditional method; law schools primarily adopt this method even today. In data collection, the following technique is generally used by the doctrinal method :–

> "Library Research, Legal theories, principles and position of law which may be easily referred by sitting in the library. Contents of the documents are self sufficient to be shown as good evidence of what law is on any issue of law and society, explanations, and object of law can be referred by bare reading of texts. That is why library research is most convenient way of data collection in legal research. Sources of data available within library are - Books, Journals, Reporters, Magazines, News Papers, Juristic work, Reports of (Seminar, conferences, symposiums, legislative, judicial and administrative proceedings), literature containing factual & philosophical information. Articles, Research papers, Thesis and Dissertations, Reports of Commissions, Court judgments and Case commentaries, etc."

Tools Proposed To Be Used For Doctrinal Research On Arbitration

- Arbitration and Conciliation Act, 1996- bare Act.
- Arbitral awards and court decisions.
- Arbitration Institutions and procedural rules.
- Journal articles on arbitration.
- Constitution of India
- Indian Evidence Act, 1872.
- Law reviews and journals.
- I have collected many case laws on arbitration, by the Supreme Court, various High Courts, and international tribunals. I have also collected various legal principles on this subject. T I have also collected various links to get data and information on this subject.
- Being a YSIAC (Young Singapore International Arbitration Council) Member, I am privileged to get information from free online lectures and seminars on international commercial arbitration, as well as access to various arbitration documents, treaties,

conventions and awards. A lot of lectures and resources on International Commercial Arbitration is available there.

- Queen Mary School of International Arbitration has developed a database named International Arbitration Case Law is also available for the purpose of research. ICSID and other investor-State disputes and its international awards are available in this data base.
- Various documents on International arbitration law , such as case law and commentaries and other miscellaneous documents.

5) Research Questions

- Q 1. What are the new technologies that can be used for an online international arbitration?
- RO 1. To find out the possibilities of new technologies which can be effectively used for a speedy international arbitration.

- RQ 2. What are the characteristics of online arbitration by exploiting the development of Information and Communication Technology?
- RO 2. To analyze the characteristics of online arbitration by exploiting the development of ICT.

- RQ 3. What are the possible jurisdictional issues in an online arbitration?
- RO 3. To analyze the possible jurisdictional issues which may arise during the online arbitration.

- RQ 4. What issues may arise on arbitrator, in an online arbitration?
- RO 4. To analyze the issue regarding the appointment, removal and related issues which may arise on arbitrator in an online arbitration.

- RQ 5. How can arbitration proceedings be conducted online?
- RO 5. To analyze how can be the arbitration proceedings be conducted online.

- RQ 6. How can an award be passed in an online arbitration?
- RO 6. To analyze and find a method that how can an award be passed in an online arbitration.

- RQ 7. What are the termination proceedings in an online arbitration?
- RO 7. To analyze the termination of proceedings in an online arbitration.

6) Hypothesis

The incorporation of Online Dispute Resolution in India would protect consumer rights by ensuring effective and cost-conscious dispute resolution solutions and therefore would provide speedy access to justice to millions of Indian consumers.

7) Tentative Chapterisation

1. Introduction
2. Use of technology as fourth party. (including Machine and data protection)
3. Question of jurisdiction
4. Commence of Arbitration
5. The Arbitrator
6. Arbitration Proceedings
7. The Award
8. Termination of Arbitration Proceedings
9. Conclusion

8) Scope of the study: This study is by doctrinal research. Arbitration and conciliation Act have very wide scope in this era of globalization. Due to the impact of globalization the international trade and foreign investment is coming to India. The traditional judicial system is lagged with cases and delay causes denial of justice. In these circumstances, Arbitration, which is a less expensive and faster method of dispute resolution has very much importance and is relevant to study. Also "online dispute resolution by using internet and parties autonomy makes the proceedings quick and free from outside interference."

> "One of the intrinsic objectives behind the enactment of Arbitration and Conciliation Act, 1996 was reducing the scope of judicial intervention. The Indian legislature in conformity with Article 5 of the UNCITRAL model law on international commercial arbitration 1985 enacted Section 5 of the Act which eliminates the scope of judicial intervention and enumerates that

no judicial authority shall intervene except where so provided by the Act."

Arbitration method of resolving the dispute is introduced for the purpose of resolving the dispute at the earliest. Therefore online arbitration will be apt to settle the commercial disputes in the domestic as well as in the international level, not only in the pandemic era but also post covid scenario. The proposed study is a Doctrinal study by analysing the reported cases and studying the literature available on the research topic. The study of case laws is not intended to analyse the merit or justification of the award/ judgment. Hence, the study on the proposed topic is relevant and having wide scope.

Most of the parties, especially those which involves commercial transactions usually prefer arbitration platform for resolving their disputes. While we compare the offline mode and the Online mode of settling disputes by arbitration always the online mode of settling the disputes has more advantages than the physical platform. We cannot deny the fact that in an online mode of we can avoid unnecessary costs of travelling and related expenditures. Both the parties, the arbitrators and the solicitors involved in the matter can save lot of time and energy. Another important advantage is that every document which is related to a particular case can be stored securely by using digital platform facility, where there are proper storage facilities.

9) Limitations of the Study

As with anything, Online Arbitration has it s share of pros and cons. Those who support the offline mode, follows the traditional rules of either going to physical courts or one advocates the traditional methods of arbitration where both the clients sit in a physical platform face to face where they try to sort out and settle down their dispute.

It can be also opined that cyberspace at all times may not be effective as physical platform. "The practice of arbitration cannot be reproduced in an online environment because

'cyberspace is not a mirror image of the physical world," well pointed out by Joel Eisen in his article[5].

> "Both the parties sitting together with a neutral person acting as their arbitrator sometimes proves beneficial as the parties will be able to understand each other in a much clearer manner which may not be possible in cyberspace, even though both the parties are sitting opposite each other[6]. The power of compelling a party who is face to face with you is easier rather than online arbitration. The process of understanding the dispute by both the parties and the arbitrator is much clearer and surer."

Hence, the topic for research is relevant in this era.

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Department: Law

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Comprehensive Review Report

1. Name of the Scholar : JASMIN KURIAN
2. Department : LAW
3. Date of Registration : 24 December 2020
4. Enrollment No : 2K21 PFL 005
5. Name of the Supervisor : DR. SOM DUTT BHARDWAJ
6. Name of the Co-Supervisor : Nil
7. Research Area :

CHARACTERISTICS OF
ONLINE INTERNATIONAL ARBITRATION IN THE
POST-COVID SCENARIO OF INDIA

8. Comments: After Jasmine's presentation, Prof. Verghese said that after Introduction, Online Arbitration should come, what is it all about then its advantages and disadvantages, further in line it should have chapters, next will come use of technology, how to use platform and what things are required for it. From point 3 to 7 it should have procedure and in the end it should have Online Dispute Resolution (ODR) which should further include proposed rules for ODR, next should be explanation of each rule, lastly he said that study is Okay.

Dr Versha was of opinion that in the title characteristics should be replaced with better word. Prof Verghese replied to it saying that "Why online is better than offline: How India can become a hub".

Prof Verghese also said that the proposed rules should include problems you solve in the rules and it should be compatible with UNCITRAL Rules. Also Advantages of Arbitration/Litigation, Difference of online/offline should also form part of it. In the chapterization, the second chapter should be use of technology, which should include 4th party information ie. Machine and also Data Protection should be its sub topics.

The panel approved the research area with title- **'Online international Arbitration in the Post Covid Scenario of India'**

17/3/21

9. Chairperson DRC: Prof.(Dr.) Versha Vahini

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10. DRC Member(s)

Expert Panelists: Prof. Jose P. Verghese (Professor Emeritus and Practitioner) and Mr. Ravikant Vasdev (Advocate)

Faculty Members: Dr. Versha Vahini (Asso. Dean), Dr. Somdutt Bhardwaj, Dr. Seema Gupta, Dr SK Bose and Dr. Tarundeep Kaur

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